Supreme Court, U.S.
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No. 95-1123

In The

Supreme Court of the United States

October Term, 1995

JERRY GODBY,
Petitioner

vs.

ELECTROLUX CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and Court of Appeals' granting of summary judgment to Respondent directly conflicts with the Supreme Court's decision in St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2742 (1993) made credibility determinations and drew improper inferences on material and disputed factual issues in favor of the Respondent and therefore improperly granted summary judgment; and

2. Whether the shifting and inconsistent reasons articulated by Respondent for Petitioner's termination create genuine issues of material fact which preclude summary judgment under St. Mary's Honor Center v. Hicks, supra.

3. Whether Respondent Electrolux waited seven months to fire Petitioner / Appellant for his protest against the illegal acts of a company officer because the company feared a lawsuit was imminent from Petitioner's wife if they acted sooner.

LIST OF PARTIES

Pursuant to Rule 14 of the Supreme Court Rules, Petitioner hereby submits a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this litigation, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to the parties.

a. Steven D. Cooper, Esq., Attorney for Respondent
b. Electrolux Corporation, Respondent
c. Orinda D. Evans, Judge, United States District Court
d. Jerry Godby, Petitioner
e. Gary R. Kessler, former Attorney for Petitioner
f. Christopher E. Parker, former Attorney for Petitioner
g. Marc A. Taylor, Attorney for Respondent
h. John F. Wymer, III, Attorney for Respondent
i. Kathleen A. Wasch, Attorney for Respondent

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STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§ 2000e, et seq.

The Age Discrimination in Emp oyment Act, 29 U.S.C.

§§ 621, et seq.

28 U.S.C. § 1331

RULES CITED

Supreme Court Rule 10 1

Federal Rules of Civil Procedure 56 7

(1) Electrolux Claims Godby's Petition Does Not Present A Proper Question For Review (Respondent's brief in Opposition. p. 9)

Respondent Electrolux contends that a review for writ of certiorari is not a matter of right, but one of judicial discretion. Godby apologizes to the court for having to bring this matter before such a high authority, but submits that he has legitimate grounds for filing his petition, whereby jurisdiction is pursuant to federal question jurisdiction under 28 U.S.C. § 1331. In his petition Godby has questioned whether the District Court and Court of Appeals' granting of summary judgment to Respondent is in direct conflict with the Supreme Court's decision in St Mary's Honor Center v. Hicks, ___U.S.___, 113 S.Ct. 2742 (1993), whether the District Court and the Court of Appeals made credibility determinations and drew improper inferences on material and disputed factual issues in favor of the Respondent and therefore improperly granted summary judgment; and whether the shifting and inconsistent reasons articulated by Respondent for Petitioner's termination creates genuine issues of material fact which preclude summary judgment under St. Mary's Honor Center v. Hicks, supra. Godby is therefore seeking a review of a case involving conflicting decisions. Sup.Ct. R. 10.

(2) Electrolux Plays Down Godby's Protest Of Discrimination (Respondent's Brief in Opposition p. 4)

Electrolux states; ***"Electrolux' request for a copy of the tape recording, along with Godby's refusal to turn over a copy of the tape recording, constitute the alleged "protest" upon which Godby's retaliation claim is based. It should be noted that at the end of her maternity leave Ms. Godby returned to work at Electrolux at her regular salary."***

These comments by Electrolux are profoundly incorrect. It is documented that Ms. Godby came back to work from her maternity leave to a clearly inferior position .(White Dep., p. 40-

41). Although she kept the same salary in her new lower grade position Ms Godby's salary was now range maximized 'frozen'. The documented evidence proves that both Jerry and Patrice Godby spoke to key officials.[1] regarding her pregnancy discrimination.

(3) Electrolux States Godby Relies On Evidence That Is Non-Existent In The Record (Respondent's Brief pp.3,4)

Godby submits that the evidence presented by him is Electrolux' own documented records that summarize his 21 years career in minute detail. Electrolux cannot dispute its own entries into Godby's personnel file. Through out this litigation Electrolux has provided shifting reasons for Godbys termination and each time he has simply pointed to his personnel file as evidence that there was no problem with his performance in 21 years until he reported and protested the discriminatory conduct of a company Vice President.

In an attempt to its show bad performance prior to Godby's protest Electrolux points to Godby's 1988-89 performance evaluation, claiming it was substandard and further claiming that he refused to sign it. Respondent states in its Brief p.4.,***"That was not a good evaluation"*** First, Godby absolutely did not refuse to sign the document. Second, there is not one unsatisfactory mark on the appraisal (I Godby Dep.p.28). In reviewing the managers signature on the appraisal (see footnote on p. 4), it becomes apparent why Godby didn't sign the document. Godby's boss Stinger did not tender a formal

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1 Upon hearing of Luisi's discriminatory actions toward Godby's wife from Godby, White, Electrolux' Southeast Area Administrator, was concerned that Luisi's actions were discriminatory and brought the issue to the attention of his (White's) immediate superiors. (White Dep., pp. 23-24). White's superiors, Clark and Campbell, agreed with White's assessment of the situation. (White Dep., p.26). White also informed Clark and Campbell that Jerry Godby mentioned that there was taped conversation between Luisi and Mrs. Godby regarding the discrimination. (White Dep., p.31). White informed Clark and Campbell that Mrs. Godby felt she was being discriminated against by Electrolux and Luisi because she had a baby. (White Dep., p 38). Clark and Campbell then discussed the pregnancy discrimination issues with Charles Malone, Electrolux' Vice President of Human Resources. (White Dep., p.27)

evaluation to Godby for this period. Another subordinate of Stinger, Debra Novak, signed his (Stingers) name to the document and simply gave Godby a copy of it. Godby submits he was never asked to sign or comment on it. (Appraisal Below) [2](I Godby Dep.p. 28)

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2 **ANNUAL PERFORMANCE EVALUATION**

NAME *Jerry Godby* DEPARTMENT *Office Services* DATE _____

POSITION TITLE _____ YEARS IN POSITION _____ DATE HIRED *2/17/70*

PERIOD COVERED BY REVIEW: FROM *3/88* TO *3/89*

RATINGS: O-Outstanding S-Superior C-Competent M-Marginal U-Unsatisfactory

Professional Knowledge: Stays abreast of current trends and changes in the technical / professional / administrative areas related to the job. Working knowledge of all phases of the job and the various techniques and skills necessary for efficient completion of tasks.	S
Coordination: Ability to work with others toward common goals and objectives; expresses individual viewpoint while also acknowledging and learning form others. Shares responsibility and credit with the team.	M
Implementation and Controlling: Ability to undertake projects and meet or exceed deadlines; anticipates project needs / changes and meets new priorities; effectively measures project progress, take correct action as needed and follows up until completed with proper sense of urgency.	C
Decisiveness: Readiness and willingness to make decisions, render judgements, initiate actions, and commit oneself to those decisions.	C
Planning and Organizing: Establishes appropriate course of action for self and subordinates to accomplish goals; makes proper assessment of personnel and appropriate use of resources; sets realistic target dates.	C
Procedures and Policies: Properly interprets and applies Electrolux policies and procedures to job responsibilities, supports AAP/EEO policies.	C
Interpersonal Skills: Ability to perceive and react to the needs of others with appropriate sensitivity and firmness	C-

(continued...)

(4) Electrolux Claims Godby's Performance Was Deficient Prior To His Protest. (Respondent's brief in Opposition pp.4,5,6,20) Electrolux states that Godby does not dispute any of the performance/ conduct reasons mentioned by Electrolux in this litigation. Godby has throughout this litigation done nothing but dispute their *ever changing* claims. With respect to Godby's defensive reaction to criticism, Electrolux is painting a picture for the court that is astronomically incomplete and misleading. Electrolux' own records prove that during the same time period that it alleges Godby performed in an unacceptable manner, pointing to his memos regarding *concern over salary and response to criticism*, the company generously rewarded

(...continued)

Verbal communication: Effectiveness of expression in individual and group situation(including listening, non-verbal communication and appropriate language).	C
Written Communication: Ability to express ideas clearly and concisely in good grammatical form. Concise and complete written reports that fully detail the assignment.	C
Judgement: Reviews data in a logical, sequential manner and draws sound conclusions.	C
Results Orientation: Effective in getting ideas accepted in delegating effectively and achieving the desired outcome in a timely and professional manner.	C
Innovation: Develops sound, creative alternatives to solving problems. Probes job responsibilities to find a "better way."	C

OVERALL PERFORMANCE RATING C

S\ F. STINGER (DSN) _____
Rating Supervisor / Manager **Date**

Performance evaluation discussed on 7/3/89 **with** _____
Date **Emp.Signature**

S\ Debra S. Novak 7/3/89
Human Resources **Date**

COMPETENT.....Meets the job requirements. The contribution to the department and company is that expected of a fully qualified and experienced employee. Satisfactorily performs all important job skills and objectives.

his accomplishments by providing him significant increases in his salary and job responsibilities including promotions. This truth can not be disputed by Electrolux in that it exists in Godby's irrefutable Employment Performance File, the entries of which were created by company Managers, not Godby. Godby points out that Electrolux' own President / CEO disputes this testimony of ***'unacceptable performance prior to Godby's protest'*** in his October 1991 entry into Godby's Employment File. This letter[3] proves that Electrolux did not have a problem with Godby's performance prior to his protest of July, August, September 1991. The President / CEO commends Godby for a Job Well Done. Simply put, Godby's expressions of concern over Horigan's unprecedented criticism and his formal concerns over a low salary increase were acceptable interactions with Godby until this litigation. Indeed, the only difference in Electrolux' normal interactions with Godby were his complaints of unlawful discrimination.

(5) Electrolux Accuses Godby of Outright Fabrications (Respondents Brief in Opposition p. 8)

Godby's testimony to the court can be substantiated by written and recorded evidence in Electrolux' own Employment File on Godby, the entries of which were written and submitted by an array of Managers, Directors and VPs over a period of twenty one (21) years.

Electrolux states; ***"Godby adduced no evidence to support a reasonable inference that he was discharged and subsequently not rehired because he was forty or in retaliation for allegedly `protesting' sex discrimination."***

It is undisputed that Godby was over 40 years of age at the time of his

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Your commitment, loyalty and dedication are attributes that contribute to the success of the Electrolux Corporation. We are proud to have a person with your special status on our team....

Please accept our congratulations on a job well done and our thank you for your continued support...

Very Sincerely

S\ Thomas J. Albani , President and C.E.O October 13, 1991

discharge and that he openly and vigorously opposed the illegal discriminatory treatment afforded his wife, another Electrolux employee, prior to his termination. Godby brought forth the age claim due to the preponderance of concerns regarding his length of service vs. his responsibilities and salary which Electrolux unknowingly confirms in its Interrogatory No.2.. (I Godby Dep. p. 205).

(6) Electrolux Claims Godby Terminated For Performance (Respondents Brief in Opposition pp. 8,20,23)

Electrolux' proffered reasons for Godby's discharge have been based on either financial or performance reasons, depending on who made the statement. Electrolux submitted the affidavit of Charles Malone in response to Godby's EEOC claim. In his sworn affidavit, Malone states only one (1) basis for Godby's termination; ***"Godby's position was eliminated in a further effort to reduce the overhead cost to the business."*** However in its brief in opposition on p.23 Electrolux disputes this sworn testimony by venomously stating... ***"The answer to why Electrolux eliminated Godby's position is because Godby was in it."*** Godby's performance was absolutely not mentioned as a reason for his dismissal in the EEOC response. In Electrolux' first response to the District Court it lists four (4) reasons for Godby's termination. (Defendant's Interrogatory No.2) Then, in its Brief in Support of Summary Judgement Electrolux lists two (2) new reasons, with two (2) prior ones omitted. A new alleged reason is an auto repair charged to a corporate account for a subordinate, bringing the total to five (5) reasons for Godby's discharge. In Defendants Interrogatory No.1 [4], Electrolux states that the company did not know of the matter until --after-- Godby' discharge.

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4 **Interrogatory No. 1. Electrolux' Response**

Since the time of Plaintiff's discharge, defendant has become aware that Plaintiff .... used a company account to make a personal, non-business purchase for a subordinate.....

Godby submits that he allowed his secretary to have her car repaired at Goodyear to afford her the opportunity to pay for the repair after payday when the bill came in. This is the same courtesy that the previous Manager had afforded Godby and others.(I Godby Dep.,p140) There was no company policy regarding the subject. Horigan was aware of this matter and did not see a problem with it as long as the bill got paid. When the secretary did not pay the bill Godby paid it to honor his commitment. (I Godby Dep. p.139, 147)

(7) Electrolux Contends Summary Judgment Is Appropriate (Respondent's Brief in Opposition, pp. 10, 20, 21,)

Godby disagrees with Respondent. In deciding a motion for summary judgment it is not the court's function to decide issues of material fact, but simply to determine whether such issues exist to be tried. Anderson v. Liberty Lobby, 477 U.S. at 249. The Supreme Court has explicitly recognized that discrimination cases present difficult issues for the trier-of-fact regarding the employer's mental process and motivation, thereby making summary judgment generally inappropriate. .,U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 716, 103 S.Ct. 1478,1482 (1983). Indeed, this Court has recognized that the existence of any material factual issues or reasonable inferences upon which a jury draw different conclusions, render summary judgment inappropriate. Hairston v. Gainesville Sun Publishing Co., 9F.3d 913 (11th Cir. 1993). The record in this case presents significant factual disputes-- including many disputes between the Defendants' own witnesses -- which make summary judgment inappropriate. There is more than ample evidence within the record which would allow a jury to return a verdict in favor of Godby. In reviewing the District Court's order granting summary judgment, this Court is to apply the same summary judgment standard as applied by the Court below. Miranda v. B&B Cash Grocery Store. Inc.,975 F.2d 1518 (11th Cir. 1992). The court must determine whether there exist any genuine issues of material fact. (Celotex Corp. v. Caterett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 1986; Barnew v. Southwest Forest Industries, 814 f.2d 607,609 (11th Cir. 1987); F.R.Civ.P.56(c). The function of the Court at the summary judgment stage is not to weigh the evidence and determine the truth of the matters alleged, but rather to determine whether there are genuine disputes properly reserved for a finder of fact. Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505,2511 (1986). If the determination of any factual issue relies upon the credibility of the witness, summary judgment is inappropriate. St Mary's Honor Center v. Hicks, __U.S.__, 113 S.Ct. 2742 (1993) (the credibility of the defendant's proffered reasons in an employment discrimination case is a question for a fact-finder). See also U.S. v. Diebold, Inc., 369 U.S. 654,655(1992); Welch v.Celotex Corp.,951F.2d 1235,1237(11th Cir1992)

Godby has pointed out to this court Electrolux' illusive manner of presenting facts. By providing only part of the facts and leaving out "the rest of the story" the court may not draw proper conclusions.

Respondent states in its brief on p.18.."***Godby's conduct in refusing to provide evidence of an alleged improper statement by an Electrolux manager bordered on insubordination.***" Electrolux must not overlook the fact that Godby was told the tape was illegal and he may be sued by Luisi. Besides, Title VII protection is not limited to tape recorded evidence. Electrolux also claimed on p.18...that ***"Godby's use of the word "interrogation" in describing Electrolux' attempt to hear the tape is, of course, intended to conjure up images of Gestapo-like coercion.*** Godby responds that only Malone asked for the tape, everyone else questioned his involvement with hostility as though Luisi was the victim instead ofMs.Godby. Horigan,Godby's boss raves..."***Your Fucking Stupid to tape an officer of the company.***"(I Godby Dep.p.63)

Godby now points to Respondents brief pp. 21, 22. Electrolux states.. "***Electrolux agrees that it did not formally discipline Godby as a result of Julian's allegations.***" In reading the District Court Order, it is apparent the Judge was led to believe Godby received disciplinary counseling in the matter, which Electrolux now disputes. A finder of fact would surely ask ***'why not?'*** to Electrolux' statement above, given that it asserts this alleged conduct as a primary basis for Godby's discharge. Electrolux further states.." ***If Electrolux had chosen to believe Julian's accusations and disbelieve Godby's denials, it could have fired Godby on the spot, that it did not do so disproves pretext.***" On the contrary, these statements only prove Electrolux did not have a performance problem with Godby regarding Julian's allegations as Godby has stated all along and the District Judge was misled.

Electrolux' own Employment History File on Godby establishes that it did not confront him with any performance issues whatsoever until Horigan's Nov. 27, 1991 showdown regarding the alleged "forgery" a matter that Horigan states he was made aware of Aug.1991 by Julian. (Horigan Dep, pp. 86-87); (Novak Dep.,p. 23), but didn't confront

Godby with his concern until three months later. Godby wrote the memo[5] after a meeting with Hoigan regarding personal phone calls, thinking that a memo on the bulletin board from Horigan would re-enforce the effort. Godby never did distribute or post it since Horigan had not reviewed it.(I Godby Dep.pp.113,114,115). The memo was placed in his desk and obviously removed by an unauthorized person.

(8) Electrolux Claims There Is No Casual Link (Respondents Brief in Opposition p.13)

Electrolux claims that since Ms. Godby did not file an EEOC charge or pursue formal relief that her situation has no merit. Godby responds that the reason Ms. Godby didn't pursue formal relief in Luisi's' discrimination against her was because the Godby's were threatened with a Luisi lawsuit. Godby will testify under oath that he did receive threats from Malone, Electrolux VP of Human Resources and Cooper, Electrolux VP and General Counsel. (I Godby Dep. p. 65, 80). Since the District Court found Godby to have satisfied the first two prongs of his *prima facia* case of retaliation his burden in establishing the final prong is best stated as follows:

[t]he causal link in the [retaliatory discharge] formula [is not] the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. Rather, we construed the 'causal link' element to require merely that the plaintiff established that the protected activity and the adverse action were not wholly unrelated. Simmons v Camden Board of Ed.,757 F.2d 1187, 1189 (11th Cir.), cert. denied, 474 U.S. 981, 106 S.Ct. 385 (1985) . See also

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5 To: Jerry Godby Date: May 16, 1991
In a previous conversation and by way of memoranda I requested you curtail personal phone calls in your area. It is apparent there has been a failure on your part to convey company policy concerning telephone usage to your department.
I expect you to resolve this situation immediately. You will not receive another warning.
S/ John Horigan

Hairston v. Gainesville Sun Publishing Co.,9 F.3d at 919; EEOC v Reichhold Chemicals, Inc.,988 F.2d 1564, 1571-72(11th Cir. 1993);Weaver v Casa Gassardo, 922 F.2d 1515 (11th Cir. 1991).

Electrolux was well aware that Ms. Godby had 180 days to submit her discrimination claim to the EEOC. This knowledge was brought forth when Electrolux responded to Godby lawsuit. (See Answer of Defendant Electrolux Corporation, p.1) Cooper is quick to state that Godby's claims are time barred regarding Ms.Godby. Given that Godby was protesting Luisi's blatant discrimination against his wife--rather than an unrelated employee--Godby asserts that it is proper to consider the statute of limitations (180 days) in determining the third prong of his *prima facia* case of retaliation. Indeed, Electrolux did not fire Godby earlier than February 1992 because it feared a lawsuit was eminent from Godby's wife if they acted sooner.

Conclusion

Godby sincerely hopes and prays that the Supreme Court will see through the deceptive wording used by Electrolux in its brief to cover the truth. Godby does not want special favors, but only for this Highest Court in the land to please review his petition openly. When read against the background of St. Mary's Honor Center v. Hicks, U.S. __, 113 S. Ct. 2742 (1993) and Sweat v. Miller Brewing Co., 708 F. 2d 655 (11th Cir.1983), it is clear that summary judgment was inappropriate in this matter. Godby hopes the Supreme Court of the United States will see that justice has not prevailed and will agree that Godby deserves his day in court.

This 9th day of March,1996.

Respectfully submitted.

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